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Elisa J. Lintemuth

Michigan State University College of Law

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WHAT MAKES A SPORTS SEASON DISADVANTAGEOUS? AN ARGUMENT THAT SAME-SEASON
SPORTS COMPLIANCE PLANS RUN AFOUL OF TITLE IX
by
Elisa J. Lintemuth

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WHAT MAKES A SPORTS SEASON DISADVANTAGEOUS? AN ARGUMENT THAT SAME-SEASON SPORTS COMPLIANCE PLANS RUN AFOUL OF TITLE IX

Elisa J. Lintemuth

INTRODUCTION

In *Communities for Equity v. Michigan High School Athletic Association*, the parents of high school girls challenged Michigan’s high school sports schedule, arguing that their daughters were at a disadvantage because they were forced to play in a “non-traditional” season.¹ Among the disadvantages claimed by the plaintiffs were “the decreased ability to be nationally ranked or obtain All-American honors,” which in turn affects the “visibility to recruiters in terms of college athletic scholarship opportunities.”² The plaintiffs sought injunctive relief under Title IX and the Equal Protection Clause of the Fourteenth Amendment, requiring male and female sports to be played in the same season, or alternatively, scheduling the same number of male and female sports in non-traditional seasons.³ This case became prominent in the public eye, raising issues as to what makes a season disadvantageous, whether non-traditional seasons are necessarily disadvantageous, and what the appropriate remedy is for a Title IX scheduling violation.

One of the most common arguments against same-season sport scheduling is that many girls who previously played two sports can no longer participate in both sports, because the seasons now overlap.⁴ While it is easy to sympathize with these girls who are compelled to

· J.D. Candidate, May 2010, Michigan State University College of Law. Special thanks to Professor Bowman for her comments and criticism.

¹ 80 F. Supp. 2d 729, 731 (W.D. Mich. 2000).

² *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 178 F. Supp. 2d 805, 819-820 (W.D. Mich. 2001), *aff’d* 377 F.3d 504 (6th Cir. 2004), *cert. granted*, *vacated* 544 U.S. 1012 (2005); *aff’d* 178 F. 3d 676 (6th Cir. 2006).

³ *Id.* at 808.

⁴ See, e.g., Courtney E. Schafer, Note, *Following the Law, Not the Crowd: The Constitutionality of Nontraditional High School Athletic Seasons*, 53 DUKE L.J. 223, 223-24 (2003) (recounting the story of twins Jeana and Jenna Hoffman, who—as a result of a Constitutional challenge to South Dakota’s sports scheduling—were forced to choose between basketball and gymnastics).

choose between two sports they love, the larger problem with the change in school athletic scheduling is that, for the majority of girls, this “solution” achieves the opposite of what Title IX was intended to achieve. Now, coaches must choose between coaching the girls’ team and the boys’ team, and court and field time must be allocated between the two. In many circumstances, what this means is that the best coaches may pick the fan-favorite⁵ and that freshmen teams may be cut, resulting in fewer opportunities for students, both male and female. I will argue that these consequences are antithetical to the goal of Title IX and that the few who benefit from this change in scheduling are not enough to outweigh the harm. Even assuming that athletic scheduling which requires females to play in non-traditional seasons violates Title IX,⁶ same-season sports scheduling is not a solution.

In Part I, I give an overview of Title IX, focusing particularly on its history and goals. I also discuss the benefits of athletic participation and the research that demonstrates that girls involved in sports are more successful in many areas of life. Lastly, I discuss how Title IX is applied and the regulations promulgated by the relevant agency, the Department of Education’s Office for Civil Rights. In Part II, I discuss Sixth Circuit’s decision in *Communities for Equity v. Michigan High School Athletic Association*. In Part III, I ask what makes a season disadvantageous and whether non-traditional seasons are necessarily inequitable. I argue that the *Communities for Equity* courts placed too much weight on inappropriate factors and failed to give enough weight to the overall benefits of participation. I conclude that same-season sport scheduling is antithetical to the intent of Title IX and does not adequately address the gender inequality it was intended to correct.

⁵ Although a girls’ team could certainly be the fan-favorite, boys’ teams have traditionally drawn larger crowds.

⁶ I would argue that non-traditional does not necessarily mean inequitable. See *supra* Section III.A.

I. TITLE IX

Title IX has opened doors for girls and drastically increased the level of participation and opportunities available to them. Prior to the enactment of Title IX, the world of high school sports was largely a boy's world. Girls represented only 7.4% of those students participating in high school athletics in the 1971-1972 school year.⁷ A decade after its enactment, the number of girls participating in school sports had increased by five hundred percent.⁸ Thirty-two years after it was enacted, in the 2005-2006 school year, girls represented 41.2% of high school student-athletes.⁹ While this figure evidences that there is still disparity between the sexes, Title IX has proved a great impetus for women in the world of sports.

In the following section, I will discuss the history of Title IX: its enactment, amendment, and the regulations that have been created to aid in its enforcement. I will then discuss the policy behind Title IX and the benefits of participation in school athletics. I will then discuss the current Title IX doctrine: the methods of bringing a claim, the remedies available, and the analysis undertaken by the courts.

A. *The History of Title IX*

Many people associate Title IX with women's athletics—in fact, Title IX has become almost synonymous with female equality in sports¹⁰—however, it was not until two years after the statute's enactment that Title IX was amended to specifically apply to athletics.¹¹ Title IX of the

⁷ NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, TITLE IX AT 35: BEYOND THE HEADLINES 8 (2008), available at <http://www.ncwge.org/PDF/TitleIXat35.pdf> [hereinafter NATIONAL COALITION] (“For many, Title IX is synonymous with expanded opportunities in athletics.”).

⁸ Wendy Olson, *Beyond Title IX: Toward an Agenda for Women and Sports in the 1990's*, 3 YALE J.L. & FEMINISM 105, 111 n.30 (1990).

⁹ AAUW, *Position on Equity in School Athletics*, http://www.aauw.org/act/issue_advocacy/actionpages/titleix_athletics.cfm#3.

¹⁰ In fact, Title IX has become so synonymous with women's sports that it is the name of a women's athletic apparel retailer. See Title Nine, <http://www.titlenine.com/>.

¹¹ Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (Aug. 21, 1974) (codified as amended at 20 U.S.C. 1681). See also Suzanne E. Eckes, *Title IX and High School Opportunities: Issues of Equity*

Education Amendments of 1972 was enacted to prohibit discrimination on the basis of sex in all programs that received federal financial assistance.¹² As Title IX scholar Susan Eckes has summarized: “Although often the focus is on athletics, Title IX prevents discrimination in all aspects of education including admissions, housing, course offerings, recruitment, financial assistance, counseling, student health, marital and parental status of students, insurance benefits, and harassment.”¹³ The pertinent statutory language reads: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under an education program or activity receiving Federal financial assistance”¹⁴ Title IX’s reach is broad, because it applies to any educational institutions receiving federal assistance, whether directly or indirectly.¹⁵ Therefore, Title IX applies to many non-public institutions, as well as the more obvious public application, because it implicates even those schools whose students receive federal grant or loan money to pay tuition.¹⁶

In 1974, Congress enacted the Javits Amendment,¹⁷ explicitly extending Title IX into athletics by requiring HEW regulations to include “reasonable provisions considering the nature of particular sports.”¹⁸ The Javits Amendment was the impetus for progress in women’s sports, but history could easily have told a different story, as the Javits Amendment was adopted only after the Tower Amendment was rejected, which would exempted revenue-producing sports

on and in the Court, 21 WISC. WOMEN’S L.J. 175, 177 (2007) (“Title IX was amended in 1974 to make the statute applicable to athletic programs.”).

¹² 20 U.S.C. § 1681(a) (2006).

¹³ Eckes, *supra* note 11, at 177.

¹⁴ 20 U.S.C. § 1681(a) (2006).

¹⁵ Elisa M. Butler, Note, *Civil Rights—No Hitting Back: Schools Have to Play by the Title IX Rules*; Jackson v. Birmingham Board of Education, 544 U.S. 164 (2005), 7 WY. L. REV. 577, 581 (2007).

¹⁶ DOJ, Title IX Legal Manual, Federal Financial Assistance, *available at* <http://www.justice.gov/crt/cor/coord/ixlegal.php#A.%C2%A0%C2%A0%C2%A0%20Federal%20Financial%20Assistance>.

¹⁷ The amendment is named after Senator Jacob Javits of New York, who introduced it.

¹⁸ Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (Aug. 21, 1974) (codified as amended at 20 U.S.C. 1681).

from complying with Title IX.¹⁹ The intent was to remove sports like men's football and basketball from the Title IX analysis,²⁰ which would have had the effect of making Title IX useless lip service to equality in athletics. Fortunately, this bill was defeated and the Javits Amendment was passed, giving HEW discretion to implement the regulations necessary to bring school athletics within the dictate of Title IX.²¹

The statute itself is fairly vague and open to interpretation.²² To this end, Congress directed the Department of Health, Education, and Welfare (HEW) to administer Title IX and to promulgate regulations for its enforcement.²³ In 1975, HEW issued its final regulations.²⁴ The regulations set forth three provisions. First, schools may not exclude a person from participation or otherwise discriminate in athletics on the basis of that person's sex.²⁵ Second, notwithstanding the first provision, separate teams may be established for different sexes, so long as the team selection is "based upon competitive skill or the activity involved is a contact sport."²⁶ Third, the Department of Education's Office of Civil Rights (OCR) will determine whether a school has provided equal opportunity through consideration of ten enumerated factors.²⁷ The regulations also gave schools an "adjustment period" in which to comply.²⁸

¹⁹ NATIONAL COALITION, *supra* note 7, at 5.

²⁰ Jerome Dees, *Access or Interest: Why Brown Has Benefitted African-American Women More than Title IX*, 76 UMKC L. Rev. 625, 630 n.47 (2008).

²¹ Ann Scales, *Student Gladiators and Sexual Assault*, 15 Mich. J. Gender & L. 205, 221 (2009).

²² See Rebecca A. Kiselewich, Note, *In Defense of the 2006 Title IX Regulations for Single-Sex Public Education: How Separate Can Be Equal*, 49 B.C. L. REV. 217, 225 (2008) ("Congress drafted Title IX's prohibition of sex discrimination in broad strokes. It, therefore, left much of the interpretation of Title IX up to the Department of Health, Education and Welfare . . .").

²³ In 1979, HEW was divided into the Department of Education and the Department of Health and Human Services. See Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 66 (1979) (codified as amended at 20 U.S.C. §§ 3401-3510 (2006)). Today, the Office for Civil Rights (OCR), a subsection of the DOE is responsible for enforcing Title IX. See U.S. Department of Education, Office for Civil Rights, <http://www2.ed.gov/about/offices/list/ocr/aboutocr.html> ("The Office for Civil Rights enforces several Federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education.").

²⁴ NATIONAL COALITION, *supra* note 7, at 5.

²⁵ 34 C.F.R. § 106.41(a).

²⁶ 34 C.F.R. § 106.41(b).

²⁷ 34 C.F.R. § 106.41(c). For a list of these factors and a discussion of their application, see Section I.C.

Elementary schools were given a year to come into compliance and secondary and post-secondary schools were given three years to do so.²⁹

A few years later, in 1978, HEW published its proposed Policy Interpretation, which was intended to clarify the regulations.³⁰ As HEW stated, the Policy Interpretation was intended to “provide[] a means to assess an institution's compliance with the equal opportunity requirements of the regulation.”³¹ After receiving over seven hundred comments and visiting eight campuses to see how the policy would actually apply, HEW published its final Policy Interpretation in 1979.³²

B. Goals of Title IX: the Benefits of Athletic Participation

In the 1979 landmark case *Cannon v. University of Chicago*, the Supreme Court stated, “Congress enacted Title IX with two principal objectives in mind: to avoid the use of federal resources to support discriminatory practices in education programs, and to provide individual citizens effective protection against those practices.”³³ Although the legislative history surrounding Title IX is far from extensive,³⁴ it is clear that the broad intent of Title IX was to prevent federal funds from being used to further sex discrimination in education.³⁵ As Birch

²⁸ 34 C.F.R. § 106.41(d).

²⁹ *Id.*

³⁰ 44 Fed. Reg. 71,413 (1979) (“The Department published a proposed Policy Interpretation for public comment on December 11, 1978.”).

³¹ 44 Fed. Reg. 71,415 (1979).

³² 44 Fed. Reg. 71,413 (1979) (“Over 700 comments reflecting a broad range of opinion were received. In addition, HEW staff visited eight universities during June and July, 1979, to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses. The final Policy Interpretation reflects the many comments HEW received and the results of the individual campus visits.”). See Section I.C for further discussion of the 1979 Policy Interpretation.

³³ 441 U.S. 677, 704 (1979).

³⁴ See Diane Heckman, *Title IX Marks its 35th Anniversary by Opening the Doors to Single-Sex Public Elementary and Secondary Schools*, 237 ED. L. REPORTER 1, 9 (2008) (“There is little legislative history regarding Title IX.”); *Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass’n*, 647 F.2d 651, 660 (6th Cir. 1981) (“The legislative history on the application of Title IX to athletic programs is scanty.”).

³⁵ 117 Cong. Rec. 39252 (1971). See also Karen J. Maschke, *An Interview on Title IX with Shirley Chisholm, Holly Knox, Leslie R. Wolfe, Cynthia G. Brown, and Molly Kaaren Jolly*, in *EDUCATIONAL EQUITY* viii (1997) (“The purpose of Title IX is to guarantee equal access for women in the academic world and in athletics. In reality, it is part of an affirmative action program.”) (statement of former Congresswoman Chisholm).

Bayh, the Indiana Senator who contributed significantly to the passage of Title IX, recently stated, of all areas he sought to address through equal rights amendments “the most egregious of all, was in the educational area. . . . because if women were given the right to educate themselves, the handcuffs would be taken off. If women had the opportunity to receive a higher education on equal footing with men, further opportunities would be theirs for the taking.”³⁶ At the time Title IX was passed, women were becoming more and more involved in the workforce,³⁷ but there was great disparity between men and women, both in professional opportunities and pay scale.³⁸ This made educational equality even more crucial to women’s progress, as Senator Bayh stated, “because education provides access to jobs and financial security, discrimination here is doubly destructive for women.”³⁹ Thus, the Act was originally aimed at equality in admission and in the classroom—athletic equality was an afterthought.⁴⁰

³⁶ Birch Bayh, *Personal Insights and Experiences Regarding the Passage of Title IX*, 55 CLEV. ST. L. REV. 463, 468 (2007).

³⁷ See Howard N. Fullerton, Jr., *Labor Force Participation: 75 Years of Change, 1950-98 and 1998-2025*, MONTHLY LABOR REV. 1, 3 (Dec. 1999), available at <http://www.bls.gov/opub/mlr/1999/12/art1full.pdf> (“Over the 1950-98 period, most of the increase in the Nation’s labor force participation rate occurred between 1970 and 1990. . . . most notably, a 14.2-percentage point increase in the aggregate labor force participation rate for women.”).

³⁸ The Equal Pay Act of 1963 was intended to address inequality in pay. 29 U.S.C. § 206 (2006).

³⁹ 118 Cong. Rec. 5806-07 (1972) (statement of Sen. Bayh). Senator Bayh continued to state that Title IX was intended to:

provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.

Id. at 5808.

⁴⁰ *Id.* See also J. Brad Reich, *All the [Athletes] Are Equal, But Some Are More Equal than Others: An Objective Evaluation of Title IX’s Past, Present, and Recommendations for its Future*, 108 PENN. ST. L. REV. 525 (2003) (“Title IX was not created to address gender inequities in intercollegiate athletics, it was created to address gender inequities in the opportunity to pursue higher education.”).

Arguably, the act’s original aim is still in need of the most progress. Women still lag behind men in areas of math and science. See generally Catherine Pieronek, *Title IX and Gender Equality in Science, Technology, Engineering and Mathematics Education: No Longer an Overlooked Application of the Law*, 31 J. COLL. & UNIV. L. 291 (2005). See also Neena K. Chaudhry & Marcia D. Greenberger, *Seasons of Change: Communities for Equity v. Michigan High School Athletic Association*, 13 UCLA WOMEN’S L.J. 1, 3 (2003) (“Women and girls still lag behind men in major areas of education. While now earning the majority of undergraduate degrees, women still earn fewer professional and doctoral degrees than men, receive approximately \$133 [million] per year less in athletic scholarships than their male counterparts, lag behind in math and science, [and] are clustered in vocational training programs that are traditionally female and lead to low-wage jobs”). But see Bayh, *supra* note 36, at 470 (“Now, sports, is where we’re way far behind.”).

A corollary goal was to remedy a history of discriminatory practices.⁴¹ For this reason, in addition to the stick that removal of federal funding provided, Title IX gave courts the equitable power to implement compliance plans in order to bring schools into conformity with Title IX. Courts have great leeway in fashioning compliance plans, and as one commentator has noted, “[t]he content of compliance plans can vary greatly—from equalizing funding, to establishing a new team, or moving a girls’ sport to its traditional season.”⁴² Because of this flexibility, compliance plans are best able to address the problem causing the violation and to carry out the intent of Title IX.

As the National Coalition for Women and Girls in Education stated: “[T]he quest for equal opportunity in school sports has always been about the educational, physiological, sociological and psychological benefits of sports and physical activity.”⁴³ While some females benefit from the financial benefit of athletic scholarships, this is a secondary effect of Title IX. Social science studies show that girls who participate in school athletics have higher grades, are more likely to graduate, and more likely to attend college than their non-athlete counterparts.⁴⁴ These girls also have greater self-confidence, better body image, lower rates of depression, and are less likely to smoke or engage in drug usage.⁴⁵ Additionally, studies show that girls involved in organized sports have lower rates of sexual activity and are less likely to become pregnant⁴⁶—all of this on top of the traditional physical benefits associated with exercise: reduced risk of heart disease and

⁴¹ Leigh E. Ferrin, *Pencil Me In: The Use of Title IX and § 1983 to Obtain Equal Treatment in High School Athletics Scheduling*, 3 MOD. AM. 15, 16 (2007).

⁴² *Id.* at 17.

⁴³ NATIONAL COALITION, *supra* note 7, at 7.

⁴⁴ *Id.* See also Kerry A. White, *25 Years After Title IX, Sexual Bias in K-12 Sports Still Sidelines Girls*, EDUC. WEEK, June 18, 1997, available at <http://www.edweek.org/ew/articles/1997/06/18/38titlei.h16.html&levelId=2100>; Ferrin, *supra* note 41, at 16; Eckes, *supra* note 11, at 175; Chaudhry & Greenberger, *supra* note 40, at 5.

⁴⁵ NATIONAL COALITION, *supra* note 7, at 7. See also White, *supra* note 44; Ferrin, *supra* note 41, at 16; Eckes, *supra* note 11, at 175; Chaudhry & Greenberger, *supra* note 40, at 5.

⁴⁶ NATIONAL COALITION, *supra* note 7, at 7. See also White, *supra* note 44; Ferrin, *supra* note 41, at 16; Eckes, *supra* note 11, at 175; Chaudhry & Greenberger, *supra* note 40, at 5.

breast cancer, healthy body weight, good posture, and prevention of osteoporosis.⁴⁷ Moreover, through their involvement with athletics, girls “learn important life skills, including the ability to work with a team, to perform under pressure, to set goals, and to take criticism. In addition, playing sports helps young women develop self-confidence, perseverance, dedication, and a competitive edge.”⁴⁸ Given this impressive list of benefits enjoyed by female student-athletes, the State should be more concerned with providing participation opportunities for all rather than increasing the scholarship opportunities for few. While I do not contest the value of athletic scholarships for those girls who are lucky enough to receive them, I would argue that this benefit is immeasurably outweighed by the many benefits of participation enjoyed by the majority.

C. Title IX Framework

In order to understand the broad intent and goals of Title IX, it is important to have an idea of its framework. In this section, I first discuss the different ways that a party can bring a Title IX claim. Then, I set forth the relevant factors that OCR and the courts use in evaluating whether a Title IX violation has occurred. Lastly, I give an overview of the different remedies available for a violation.

Today, a party seeking to resolve a Title IX violation has four routes available to do so: (1) using the institution’s own grievance procedure; (2) filing a complaint with OCR, the agency responsible for Title IX compliance; (3) initiating a compliance review by OCR; or (4) filing a private lawsuit in federal court.⁴⁹ Originally, a Title IX complaint could only be filed through the OCR, after which the agency would conduct an investigation and make a determination

⁴⁷ See NATIONAL COALITION, *supra* note 7, at 7; Chaudhry & Greenberger, *supra* note 40, at 5-6.

⁴⁸ Chaudhry & Greenberger, *supra* note 40, at 5.

⁴⁹ Diane Heckman, *Women and Athletics: A Twenty Years Perspective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 14 (1992).

within ninety days.⁵⁰ If the OCR determined that a violation had occurred, the OCR had another ninety days to obtain a compliance agreement with the offending school.⁵¹ Additionally, the OCR conducted “compliance reviews,” under which the agency would select a certain number of institutions to investigate for compliance.⁵² It was not until 1979, in *Cannon v. University of Chicago*, that the United States Supreme Court held that a plaintiff may also bring a private cause of action in federal court.⁵³ Although private suits may only be an option for those who have the resources to pay for litigation costs, one commentator has said that “they are often an easier, more effective means of bringing a school into compliance than relying on the OCR.”⁵⁴

The 1975 regulations include a ten-factor analysis to aid in determining whether equal opportunity exists in athletics.⁵⁵ Under this analysis, the Office of Civil Rights will consider:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.⁵⁶

The factors are to be considered as a whole, and one factor alone may not be determinative.⁵⁷ Of the ten, the first factor is the most important. In *Kelley v. Board of Trustees*, the Seventh Circuit

⁵⁰ See Education Amendments of 1974, Pub. L. No. 92-318, § 902, 86 Stat. 235, 374 (1972); 44 Fed. Reg. 71,413, 71,418 (1979).

⁵¹ 44 Fed. Reg. at 71,418.

⁵² *Id.*

⁵³ 441 U.S. 677, 717 (1979). Plaintiffs may bring suit in federal court, seeking injunctive and declaratory relief, in addition to attorneys’ fees. Heckman, *supra* note 49, at 21-22.

⁵⁴ Kerry A. White, *25 Years After Title IX, Sexual Bias in K-12 Sports Still Sidelines Girls*, EDUC. WEEK, June 18, 1997, available at www.edweek.org/ew/articles/1997/06/18/38titlei.h16.html.

⁵⁵ 34 C.F.R. § 106.41(c).

⁵⁶ *Id.*

⁵⁷ See Eckes, *supra* note 11, at 177.

stated that “[a]lthough [the regulation] lists nine other factors, an institution may violate Title IX solely by failing to effectively accommodate the interest and abilities of student athletes of both sexes.”⁵⁸ Under the First Circuit’s holding in *Cohen v. Brown University*, the regulation “deserves controlling weight” and the Policy Interpretation “warrants substantial deference.”⁵⁹

Broadly speaking, Title IX requires that (1) equal opportunities exist for men and women to participate in athletics; (2) schools allocate athletic scholarships equally between men and women; and (3) men and women are otherwise treated equally in all aspects of a school’s athletic program.⁶⁰ These three areas are independently evaluated, but the most often litigated is equal opportunity in participation.⁶¹ OCR has promulgated regulations to assist schools in compliance with the directive of Title IX. Compliance in the area of participation is measured by what has become known as the three-part test.⁶² Under the three-part test, set forth in the Policy Interpretation issued by HEW in 1979, compliance will be found if any of the following conditions exist: (1) if male and female participation opportunities are “provided in numbers substantially proportionate to their respective enrollments”; (2) if the members of one sex are underrepresented, the institution can show a practice of expanding programs in response to interest and abilities; or (3) if none of the above, whether the institution can show that the students’ interests and abilities are “fully and effectively accommodated by the present program.”⁶³ Although the test was written with intercollegiate athletics in mind, HEW noted that

⁵⁸ 35 F.3d 265, 268 (7th Cir. 1994) (citing *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993); *Cohen v. Brown Univ.*, 991 F.2d 888, 897-98 (1st Cir. 1993)). *But see* Eckes, *supra* note 11 (“[A] school was not automatically in violation of Title IX if it failed to meet one of the factors; rather, the Director of HEW was required to consider these factors in their totality.”).

⁵⁹ 101 F.3d 155, 173 (1st Cir. 1996).

⁶⁰ *See* Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 MICH. J. L. REFORM 13, 47 (2001); Chaudhry & Greenberger, *supra* note 40, at 9.

⁶¹ Brake, *supra* note 60, at 47.

⁶² 44 Fed. Reg. 71,418 (1979). *See* Brake, *supra* note 60, at 46-61 (discussing and critiquing the three-part test).

⁶³ 44 Fed. Reg. 71,418 (1979). The legitimacy of this test has been challenged on several occasions and repeatedly upheld, most notably in *Cohen v. Brown University*. 101 F.3d 155 (1st Cir. 1996).

“its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation.”⁶⁴ Furthermore, the Sixth Circuit has applied the three-part test in the high school setting, showing that it applies in this context.⁶⁵

Importantly, intent is not an element in a Title IX claim.⁶⁶ This is significant because Title IX is thus able to address those situations in which a disparate impact occurs through an otherwise neutral policy that a school adopted with the best intentions. It also eases the burden of proof for plaintiffs, who do not have to show a discriminatory purpose, as they would in an Equal Protection Claim.⁶⁷ However, while intent is not an element, it is not irrelevant. Intent is the deciding factor in whether damages are awarded.⁶⁸

The only explicit remedy for a successful Title IX challenge is removal of federal funding until the violating institution comes into compliance.⁶⁹ The removal of funding is effective as to the entire institution, not just those funds earmarked for the discriminatory program.⁷⁰

⁶⁴ 44 Fed. Reg. 71413 (1979).

⁶⁵ See *Homer v. Ky. High Sch. Athletic Ass’n*, 43 F.3d 265, 274 (6th Cir. 1994).

⁶⁶ Susannah Carr, *Title IX: An Opportunity to Level the Olympic Playing Field*, 19 SEATON HALL J. SPORTS & ENT. L. 149, 173 (2009).

⁶⁷ *Washington v. Davis*, 426 U.S. 229 (1976) (holding that, unless discriminatory purpose is found, only rational basis review applies in discriminatory impact cases).

⁶⁸ See *Franklin v. Gwinnett County Pub. Sch.* 503 U.S. 60, 74-75 & n.8 (1992) (“[W]e conclude that a money damages remedy is available under Title IX for an intentional violation.”). Title IX is not an exclusive mechanism, however, and parties may seek damages through a § 1983 suit, regardless of intent. *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788 (2009). For an argument that punitive damages are needed to improve Title IX enforcement, see generally Katrina A. Pohlman, *Have We Forgotten K-12: The Need for Punitive Damages to Improve Title IX Enforcement*, 71 U. PITT. L. REV. 167 (2009).

⁶⁹ Ferrin, *supra* note 41, at 17. See also *Cohen v. Brown Univ.*, 101 F.3d 155, 167 (1st Cir. 1996) (noting that “the statute itself provides for no remedies beyond the termination of federal funding”). Ironically, even though it is the only explicit remedy to Title IX violations, OCR has never actually removed federal funding from an offending institution. See Jollee Faber, *Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment*, 2 UCLA WOMEN’S L.J. 85, 116 (1993) (“No institution has ever lost its funding under Title IX, and in only a few cases has funding been delayed pending compliance.”).

⁷⁰ The Civil Rights Restoration Act of 1988, 20 U.S.C. § 1687 (1988) (overruling Supreme Court’s decision to the contrary in *Grove City College v. Bell*, 465 U.S. 555(1984)). This was not always clear, however. In 1984, the Supreme Court decided *Grove City College v. Bell*, which held that the funds would be withdrawn from the specific program at issue. 465 U.S. 555. Congress expressed its dissatisfaction with this ruling in the Civil Rights Restoration Act, where it stated: “(1) certain aspects of recent decisions and opinions of the Supreme Court cast doubt upon the broad application of Title IX . . . and (2) legislative action is necessary to restore the prior consistent and long standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.” Pub. L. 100-259, § 2, 102 Stat. 28 (codified at 20 U.S.C. § 1687 (1990)).

Additionally or alternatively—in order to remedy the discrimination at the heart of the claim—courts may issue compliance plans for the institution to follow.⁷¹ As noted above, the substance of these plans vary widely from case to case and are tailored to the violations at the institution at issue.⁷² Damages are noticeably absent from the Title IX framework, which is why Title IX claims are often brought in conjunction with Section 1983 and Equal Protection Clause claims.⁷³ The exception to this rule was created in *Franklin v. Gwinnett County Public Schools*, in which the Supreme Court held that compensatory damages may be awarded under Title IX if intentional discrimination is established.⁷⁴

Communities for Equity v. Michigan High School Athletic Association

One recent case brought Title IX to a forefront in high school athletic scheduling: *Communities for Equity v. Michigan High School Athletic Association*.⁷⁵ The case was largely publicized and has been written about widely. This case is a good lens through which to discuss the merits of same-season sports scheduling and the relative advantages and disadvantages of non-traditional seasons. In this section, I discuss the procedural history of *Communities for Equity*. Then, I set forth the plaintiffs’ arguments and the defendant’s response and counter-arguments. Lastly, I explain the court’s holding and the subsequent compliance plan.

Communities for Equity has a long and complicated procedural history. In June of 1998, Plaintiff parents brought suit in federal court on behalf of their student-athlete daughters, arguing that the Michigan High School Athletic Association’s (MHSAA) sports scheduling violated Title IX, the Equal Protection Clause of the Fourteenth Amendment, and the Elliott-Larsen Civil

⁷¹ *Id.*

⁷² See *supra* note 42 and accompanying text.

⁷³ *Id.* Equal Protection claims are reviewed under an intermediate standard of scrutiny, because sex is not a “suspect class.” See *Craig v. Boren*, 429 U.S. 190 (1976). Despite the importance of Equal Protection claims in Title IX cases, this paper will be limited in scope to a discussion of Title IX.

⁷⁴ 503 U.S. 60, 76 (1992). *Franklin* also implied that injunctive relief would be available under Title IX. See *Cohen*, 101 F.3d at 167.

⁷⁵ *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 459 F.3d 676 (6th Cir. 2006) (en banc).

Rights Act (ELCRA), a Michigan statute.⁷⁶ In December of 2001, the district court held that MHSAA's actions violated all three.⁷⁷ On appeal, the Sixth Circuit upheld the holding of the district court, but affirmed only on the basis of the Equal Protection Clause.⁷⁸ The Sixth Circuit intentionally chose to not address plaintiffs' Title IX or ELCRA claims.⁷⁹ MHSAA filed a petition for writ of certiorari with the United States Supreme Court.⁸⁰ The Supreme Court vacated the decision of the Sixth Circuit and remanded the case for consideration in light of the Court's decision in *Rancho Palos Verdes v. Abrams*⁸¹ in which it held that under the Court's *Sea Clammers* Doctrine, the Telecommunications Act precluded individually enforceable rights under § 1983 because the statute provided a "comprehensive enforcement scheme".⁸² Over seven years after its commencement, the Sixth Circuit made its final pronouncement on the case. On remand, the Sixth Circuit affirmed its prior decision, and in addition, held that Title IX was not an exclusive federal remedy⁸³ and that MHSAA had violated Title IX, the Equal Protection Clause, and ELCRA.⁸⁴

In their original complaint, Plaintiffs alleged discrimination in seven different areas, but by trial, plaintiffs' claims were based solely on the fact that MHSAA scheduled girls' sports in

⁷⁶ *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 807-08 (W.D. Mich. 2001). Plaintiffs originally claimed other violations, but all of these were settled through court-ordered mediation. *Id.* at 807.

⁷⁷ *Id.* at 862.

⁷⁸ *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 377 F.3d 504, 513 (6th Cir. 2004).

⁷⁹ *Cmtys. for Equity*, 459 F.3d at 679.

⁸⁰ *Id.*

⁸¹ *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 544 U.S. 1012, 1012 (2005).

⁸² *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120, 127 (2005) (quoting *Blessing v. Freestone*, 520 U.S. 329, 341 (1997)).

⁸³ The Sixth Circuit's holding that Title IX is not an exclusive remedy was upheld in *Fitzgerald v. Barnstable School Committee*, 129 S. Ct. 788 (2009). Although the case has been widely discussed, *see, e.g.,* Ferrin, *supra* note 41, the focus is on the Sixth Circuit's determination of preclusions issues rather than the application of Title IX itself. I am more interested in the arguments made by both parties with respect to the advantages and disadvantages of "traditional" sports scheduling and the three options the district court offered MHSAA to cure the violation. Therefore, much of this discussion will focus on the district court opinion rather than the opinions of the higher courts.

⁸⁴ 459 F.3d at 695-97.

“disadvantageous, nontraditional seasons.”⁸⁵ The claims were limited to the scheduling of six girls’ sports: tennis, soccer, volleyball, basketball, golf, and swimming and diving.⁸⁶ Plaintiffs claimed that all the sports—with the exception of golf—were played in a nontraditional seasons of the year, and that “the non-traditional season is a disadvantageous time of the year to play the sport, causing inequities for girls.”⁸⁷ As to golf, plaintiffs contended that, though it was played in the traditional spring season, “the non-traditional season of fall is far superior to the spring season, and fall is when Lower Peninsula Michigan boys play golf.”⁸⁸ Plaintiffs sought injunctive relief, asking the court to require girls and boys sports to be scheduled in the same season (and volleyball played in its traditional fall season).⁸⁹ Alternatively, the plaintiffs asked that MHSAA be required to schedule the same number of boys’ sports in nontraditional seasons as girls’ sports, so as to reallocate the burden in a more equitable manner.⁹⁰

Specifically, looking at plaintiffs arguments as to one sport in particular—basketball⁹¹—plaintiffs argued that that by scheduling basketball in the fall, rather than the traditional winter season, Michigan girls miss out on the ability to play basketball during “March Madness,” when the public eye is on NCAA basketball.⁹² Two student athletes testified that this means that the boys’ team gets all the publicity and hype that come from playing during that season of the year.⁹³ Additionally, the plaintiffs argued that Michigan girls were at a disadvantage for All-

⁸⁵ 178 F. Supp. 2d at 807.

⁸⁶ *Id.*

⁸⁷ *Id.* Golf and swimming and diving were only at issue in the lower peninsula schedules. *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 808.

⁹⁰ *Id.*

⁹¹ The district court opinion addressed the arguments for and against the non-traditional season for each sport at issue, but for brevity’s sake, I will focus on the first sport addressed in the opinion in order to give a general idea of the arguments made on each side.

⁹² *Id.* at 818-19.

⁹³ *Id.*

American team selections and national rankings.⁹⁴ This in turn affects visibility to recruiters, and can have a negative impact on athletic scholarship opportunities.⁹⁵ Furthermore, evidence was introduced that girls were unable to play games on Friday nights, because boys' football plays those nights.⁹⁶ Lastly, the boys' winter season was three weeks longer than the girls' fall season, which resulted in less practice and play time for girls.⁹⁷ Plaintiffs argued that there are general, psychological harms to girls, and that the inequitable treatment of boys and girls sports gave the message that girls are "second-class" or that their athletic role is of less value than that of boys."⁹⁸ Furthermore, they argued that this had an effect on boys, who receive a corresponding message: that boys are superior to girls.⁹⁹

In response, MHSAA contended that the girls' sports schedule was actually *advantageous*, because it increased participation opportunities and addressed logistical issues, such as court and field space and practice and game scheduling; therefore, MHSAA contended, the schedule was not discriminatory and did not violate any of the statutory or constitutional provisions at issue.¹⁰⁰ Boys' sports existed before girls' sports did, so as MHSAA-sanctioned girls' sports were created, they were fitted around the boys' sports in a manner that "allowed for the best use of facilities, faculty and officials."¹⁰¹ MHSAA also argued that playing in a non-traditional season has the added benefit of increased recruitment opportunities, because college women's coaches have

⁹⁴ *Id.* at 819-20.

⁹⁵ *Id.* at 820.

⁹⁶ *Id.* at 819. Personally, I am unable to understand why football games being played on Friday nights prevents girls basketball from being played on Fridays as well. The sports play in different spaces, with different coaches, and different officials.

⁹⁷ *Id.* at 820. This seems to be an issue that could be addressed, even if the sport remained in the fall season, however.

⁹⁸ *Id.* at 837.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 808.

¹⁰¹ *Id.* at 815.

fewer NCAA recruiting restrictions in the fall and have increased availability with less teams competing for attention.¹⁰²

MHSAA pointed to “[e]nsuring the greatest number of participation opportunities” as its primary goal for having the girls play in different seasons than the boys’ teams.¹⁰³ MHSAA argued that it could not schedule girls and boys basketball, swimming, and soccer concurrently, because there are an insufficient number of facilities in Michigan.¹⁰⁴ By scheduling the sports in different seasons, MHSAA claimed that schools were able to sponsor junior varsity and freshman teams in addition to the varsity teams, and that scheduling the seasons concurrently would require cutting teams, which would have the effect of reducing opportunities for both boys and girls.¹⁰⁵ Additionally, many schools would have to decrease team size to make the existing facilities work, further cutting into participation opportunities available to students.¹⁰⁶

MHSAA also argued that in giving girls’ sports a separate season, they were given their own “independent identity.”¹⁰⁷ As the MHSAA framed this argument, by playing in a different season than the boys, the girls “do not have to compete with boys’ [sports] for attention of many kinds, and thus receive increased recruiting opportunities and media coverage.”¹⁰⁸ This concept was based on the assumption that boys’ sports, particularly basketball, would overshadow the girls’ sports, resulting in less fan support if the two were played in the same season.¹⁰⁹

The district court rejected MHSAA’s arguments, and held that MHSAA had not presented sufficient evidence to show that “logistical concerns could not be resolved if both sexes played in

¹⁰² *Id.* at 817. However, the district court stated that MHSAA did not offer any evidence to show that this translated into more athletic scholarships or spots on college teams. *Id.*

¹⁰³ *Id.* at 839.

¹⁰⁴ *Id.* at 840.

¹⁰⁵ *Id.* at 839-40.

¹⁰⁶ *Id.* at 840.

¹⁰⁷ *Id.* at 845.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

the same season.”¹¹⁰ The court found that MHSAA’s evidence was largely anecdotal and did not explain how other states were able to schedule seasons concurrently, while Michigan was not.¹¹¹ As MHSAA bore the burden of persuasion and production, the evidence was therefore insufficient.¹¹² Furthermore, MHSAA presented evidence that Michigan’s participation rates, both in boys’ and girls’ athletics, were high compared to other states’.¹¹³ The court rejected this evidence, calling it “circumstantial” and stating that these comparisons were “not apt,” given Michigan’s high population and “an unlimited number of other factors that influence participation numbers besides seasons.”¹¹⁴

Having been found to violate Title IX, MHSAA was obligated to enter into a compliance plan. The plan MHSAA proposed involved switching the girls’ and boys’ tennis, swimming, and golf seasons, so that each sex would play three sports in nontraditional seasons.¹¹⁵ While this plan seemingly complied with the district court’s order, which stated that “as long as girls and boys share the advantages and disadvantages of the new seasons equitably, this Court will approve the Compliance Plan,”¹¹⁶ the district court rejected it nonetheless, and held that MHSAA had to switch girls’ basketball and volleyball to their traditional seasons in order to be in compliance with Title IX.¹¹⁷ Interestingly, while rejecting MHSAA’s proposed plan, the court nonetheless stated that same-season sports scheduling would resolve the violation.¹¹⁸ In August 2002, when the district court rejected MHSAA’s proposed compliance plan, it offered three options for coming into compliance with Title IX:

¹¹⁰ *Id.* at 839.

¹¹¹ *Id.* at 840.

¹¹² *Id.*

¹¹³ *Id.* at 841.

¹¹⁴ *Id.* at 841-42.

¹¹⁵ Shafer, *supra* note 4, at 237.

¹¹⁶ *Cmtys. for Equity*, 178 F. Supp. 2d at 862.

¹¹⁷ *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, No. 1:98-CV-479, 2002 U.S. Dist. LEXIS 14220 (W.D. Mich. Aug. 1, 2002).

¹¹⁸ *Cmtys. for Equity*, 178 F. Supp. 2d at 841-42.

- (1) combine all sports seasons so both sexes' teams play in the same season ... and move girls' volleyball to its advantageous season of fall; or (2) reverse girls' basketball and volleyball; and in the Lower Peninsula, reverse two girls' seasons with two boys' seasons from among golf, tennis, swimming, and soccer; and in the Upper Peninsula, keep combined seasons in golf and swimming and reverse seasons in either tennis or soccer; or otherwise treat the Upper Peninsula the same as the Lower Peninsula; or (3) reverse girls' basketball and volleyball; and in both peninsulas, combine seasons in two sports, and reverse seasons in one of the two remaining sports at issue.¹¹⁹

MHSAA selected the second of these options in October 2002, choosing to swap girls and boys seasons for golf and swimming and diving.¹²⁰

However, it was not until almost five years later, in the fall of 2007, that MHSAA actually began to implement the compliance plan.¹²¹ Before complying with the plan, MHSAA appealed the district court's decision to the Sixth Circuit Court of Appeals, which affirmed the lower court, but solely based on Plaintiffs' Equal Protection claim.¹²² MHSAA appealed again, filing a petition for writ of certiorari with the United States Supreme Court.¹²³ The Supreme Court vacated the Sixth Circuit's holding and remanded the case so that the Sixth Circuit could make a determination of the merits of Plaintiffs' Title IX claim in light of the Court's decision in *Rancho Palos Verdes*.¹²⁴ On remand, the Sixth Circuit held that MHSAA had indeed violated Title IX.¹²⁵ MHSAA appealed again, but came to the end of the line when the Supreme Court denied certiorari on April 2, 2007.¹²⁶ That next fall, MHSAA implemented the compliance plan approved by the district court and it continues to schedule boys' and girls' sports in conformity

¹¹⁹ *Cmtys. for Equity*, 459 F.3d at 698.

¹²⁰ *Id.*

¹²¹ Ferrin, *supra* note 41, at 16.

¹²² *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 377 F.3d 504, 513 (6th Cir. 2004).

¹²³ *Id.*

¹²⁴ *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120, 127 (2005) (quoting *Blessing v. Freestone*, 520 U.S. 329, 341 (1997)).

¹²⁵ 459 F.3d at 695-97.

¹²⁶ *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 127 U.S. 1322 (2007).

with this plan today. However, despite the plan's aim to remedy discrimination, inequalities still remain.

II. Same Season Sports: An Inequitable Solution

First, in order for non-traditional season scheduling to be a violation of Title IX, non-traditional seasons must also be disadvantageous. I argue that, despite the Sixth Circuit's decision in *Communities for Equity*, non-traditional does not usually mean disadvantageous. Even if non-traditional seasons are disadvantageous and violate Title IX, requiring girls' and boys' sports to be scheduled in the same seasons is an overly simplistic solution that does not further the goals of Title IX.

A. *Does Nontraditional Mean Disadvantageous?*

The mere fact that a sport is scheduled in a nontraditional season does not mean that it violates Title IX.¹²⁷ “Whether a sports season is ‘traditional’ is only important if the traditional season is also ‘the most advantageous playing season for the high school sports at issue.’”¹²⁸ While a non-traditional season does not indicate a per se violation of Title IX, there is often a reason that a sport is generally played in a particular season. In states like Michigan, for example, some sports—like alpine skiing and ice hockey—are best played in the cold of winter, while other sports—like golf and baseball—are best played in the warmer seasons. These kinds of real, identifiable differences certainly justify classifying one season as advantageous and another as disadvantageous.

¹²⁷ *Cmtys. for Equity*, 178 F. Supp. 2d at 808 (“[T]he Court cares about traditional sports seasons only to the extent that a traditional season, or the season when the sport is usually played at most levels, happens to be the most advantageous playing season for the high school sports at issue in this case. So if girls play sports in non-traditional seasons when boys play in traditional seasons, that does not necessarily break the law, if girls and boys are equally advantaged by the season in which they play a sport.”).

¹²⁸ Shafer, *supra* note 2, at 232.

However, the district court’s decision in *Communities for Equity* placed much weight on the evidence that Michigan girls’ sports were not played in the NCAA season, but that the majority of boys’ sports were. This kind of weight is not supported by the OCR ten-factor analysis set forth in the OCR Policy Interpretation.¹²⁹ The OCR regulations set forth ten factors, none of which involve seasons or comparisons to the NCAA.¹³⁰ While this kind of consideration could arguably be supported by the third factor, “[s]cheduling of games and practice time,”¹³¹ this component seems more concerned with the days and times of practices and games, rather than seasons. The OCR’s Policy Interpretation indicates that compliance with this third component should be evaluated

by examining, among other factors, the equivalence for men and women of:

- (1) The number of competitive events per sport;
- (2) The number and length of practice opportunities;
- (3) The time of day competitive events are scheduled;
- (4) The time of day practice opportunities are scheduled; and
- (5) The opportunities to engage in available pre-season and post-season competition.¹³²

This detailed, albeit nonexhaustive, list does not mention the scheduling of seasons even once as a consideration in determining whether a school is in compliance with the “[s]cheduling of games and practice time” element of the OCR analysis. Similarly, an argument could be made that disadvantageous seasons could be a factor addressed by the broad statement at the end of the ten-factor analysis that “Section 80.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity.”¹³³ However, nothing in the Policy Interpretation suggests that the scheduling of seasons should be considered in determining compliance. Therefore, as one commentator has noted, “a reasonable reading of the Policy

¹²⁹ See *supra* Section I.C for a discussion of the ten-factor analysis.

¹³⁰ See *supra* Section I.C for a discussion of the ten-factor analysis.

¹³¹ 34 C.F.R. § 106.41(c)(3).

¹³² Policy Interpretation of Title IX, 44 Fed. Reg. 7,413, 7,416 (Dec. 11, 1979).

¹³³ 44 Fed. Reg. at 7,415.

Interpretation leads to the contrary conclusion—that if a factor were meant to be determinative, the drafters would have explicitly made mention of this.”¹³⁴

Conversely, scheduling space-sensitive boys’ and girls’ sports in separate seasons will make compliance with the OCR’s factors easier. Specifically, provision of equipment and supplies; scheduling of games and practice time; opportunity to receive coaching and academic tutoring; assignment and compensation of coaches and tutors; and provision of locker rooms, practice and competitive facilities will all be easier requirements to meet if girls’ and boys’ sports are scheduled in separate seasons.¹³⁵ This will also make the best of schools’ resources and will not limit the opportunities available to students to participate.

By focusing entirely on the season in which girls play, courts give too much deference to the way things are done in the NCAA. This focus is inappropriate for multiple reasons. First, most high schools encourage maximum participation by supporting several teams for each sport. Conversely, colleges support one team for each sport. Because colleges do not support as many teams, the logistical issues that exist at the high school level are not present in colleges. Rather than supporting three to four boys’ basketball teams and three to four girls’ basketball teams, colleges generally support one men’s basketball team and one women’s basketball team. While there may be intramural and club teams at the college level, these teams do not receive the same support from the school and they are not treated as seriously.

Second, in high school, students often play multiple sports.¹³⁶ In college, however, the multiple-sport athlete is rare, if not discouraged.¹³⁷ The average high school student-athlete who

¹³⁴ Schafer, *supra* note 4, at 240.

¹³⁵ See *supra* note 56 and accompanying text. See also 34 C.F.R. § 106.41(c).

¹³⁶ See, e.g., *id.* at 223 (discussing Hoffman twins who participated in both high school basketball and gymnastics); Jesse Geleynse, *Multi-sport Athletes Both a Necessity and a Rarity*, LE MARS DAILY SENTINEL, Mar. 23, 2010, available at <http://www.lemarssentinel.com/story/1620295.html> (discussing high school senior Kayla Holtgrewe, a four-sport athlete). There are noted benefits to playing multiple sports. See Detavius Mason, Guilford Orthopaedic and Sports Medicine Center, *Age of Specialization: One Sport v. Mutisports*, <http://www.guilfordortho.com/>

is given the opportunity to play at the college level must forego any opportunities available in other sports in order to play in her sport of choice. Therefore, the season in which sports are scheduled is less important in college, because colleges do not have to worry about scheduling sports so that students can best participate in multiple seasons. For example, in high school sports, girls' volleyball and basketball are best scheduled in different seasons, because many girls participate in both sports, since girls who excel in one often excel in the other.

Lastly, high school sports and college sports serve different purposes. The NCAA caters to elite athletes, while high school athletics are meant to serve students of all talents and abilities. Particularly in Division One universities, the focus shifts further from participation and the social, mental, and physical benefits of sport to winning; in fact, it is not rare for a coach to be fired after too many losing seasons in a row.¹³⁸ Given these many differences between high school athletics and college athletics, whether or not a sport is played in its traditional NCAA season is not an appropriate focus for determining whether non-traditional seasons are also disadvantageous.

Lastly and additionally, in evaluating whether non-traditional seasons are disadvantageous seasons, too much weight is given to the effect of seasons on college recruiting and scholarships. Only a small percentage of high school athletes go on to play at the college level.¹³⁹ Of these

age_of_specialization.htm ("So allow your child to participate in multiple sports. That way he or she can become adept to using a multitude of muscles and puts less stress on the muscles and bones they use in their primary sport. Participating in multiple sports also allows them to see if they are talented in another sport, less stress on the body, overall athleticism increases, gain more friends & social interaction, and there is less pressure to be perfect.").

¹³⁷ See ESPN, *What Makes Division I Different?*, May 22, 2007, <http://sports.espn.go.com/ncaa/news/story?page=CampusCall> ("At D1 schools I feel playing multiple sports is more difficult, as you miss offseason training when you are in another sport's main season.") (statement of Meghan Murphy, lacrosse player at Notre Dame).

¹³⁸ See, e.g., John Bohnenkamp, *Iowa Coach Fired After 10-22 Season*, HAWK EYE, Mar. 16, 2010, available at <http://www.thehawkeye.com/story/BKC-Lickliter-031610>; Associated Press, *UNLV Football Coach Out After 5 Losing Seasons*, DESERET NEWS, Nov. 16, 2009, available at <http://www.deseretnews.com/article/705344880/UNLV-football-coach-out-after-5-losing-seasons.html>.

¹³⁹ See College Sports Scholarships, Percentage Chance of Playing an NCAA College Sport, <http://www.collegesports-scholarships.com/percentage-high-school-athletes-ncaa-college.htm>. The percentage of high school athletes who go on to play on college teams depends on the sport at issue. While only 3.1% of boys'

students, many will play at Division III schools, which do not offer athletic scholarships.¹⁴⁰ According to the NCAA, only two percent of high school athletes will be awarded college scholarships for their athletic accomplishments.¹⁴¹ Although athletic scholarships may enable some girls to go to college who might not otherwise be able to,¹⁴² the primary reasons for high school athletics are those benefits associated with participation, not providing post-secondary opportunities.¹⁴³ As NCAA Vice President of Membership Services, Kevin Lennon, stated, “We stress to parents and students everywhere that you should participate in [high school] athletics for the values and benefits that sports can give, not because you want a scholarship.”¹⁴⁴

Ultimately, from a cost-benefit analysis, same-season sports scheduling harms more students than it helps. On one hand, a few elite athletes are able to secure athletic scholarships and places on college teams that will allow them to further hone their abilities; for a lucky few, these college careers may lead to professional careers. However, the number of students who receive these kinds of benefits is miniscule in comparison to the number of students who receive less apparent

high school basketball players go on to play at the college level, this number goes as high as 11% for boy’s ice hockey.

¹⁴⁰ NCAA, *How Do Athletic Scholarships Work*, <http://www.ncaa.org/wps/wcm/connect/9b2e1b804e0dc6e694f8f41ad6fc8b25/How+do+Athletic+Scholarships+Work.pdf?MOD=AJPERES&CACHEID=9b2e1b804e0dc6e694f8f41ad6fc8b25>.

¹⁴¹ *Id.* (“According to recent statistics, about 2 percent of high school athletes are awarded athletics scholarships to compete in college.”). The percentage of student-athletes receiving athletic scholarship varies by sport:

In [boys’ wrestling and soccer], the number of Division I scholarships offered in a given year accounts for less than half a percent of high school participants.

The sport with the highest percentage of high school participants earning at least a partial athletic scholarship is girls golf at 1.6 percent.

Football ranks second, with 1.4 percent of its high school participants in a given year earning a scholarship at a Division I university.

Jenny Dial, *Long, Long Shot: There Are Many Things To Be Gained When Kids Participate in High School Sports, But a College Scholarship Might Not Be One of Them*, HOUSTON CHRONICLE, Jan. 31, 2010, available at <http://www.chron.com/dispatch/story.mpl/sports/6844161.html>.

¹⁴² And this is even somewhat dubious, as “natural talent alone isn’t enough. These days, it’s as much about private coaching and national exposure.” Dial, *supra* note 141 (noting that parents often spend thousands of dollars in club sport and travel fees, private lessons, and equipment). What this means is that those student-athletes from financially-strapped families may be unable to afford the cost of private teams and lessons needed to receive a scholarship.

¹⁴³ Schafer, *supra* note 4, at 247 (stating that “the primary objective of high school athletics in Michigan is not developing and preparing athletes for collegiate-level competition”).

¹⁴⁴ Dial, *supra* note 141.

benefits from participating. As discussed *supra*, participation in school athletics is positively correlated with academic performance, self-esteem, physical well-being, and interpersonal skills, and negatively correlated with instances of depression, drug usage, teenage pregnancy, and delinquency.¹⁴⁵ These benefits to the majority greatly outweigh the extra benefits to the elite minority, and suggest that any remedy that may enhance the extra benefits of college scholarships and recruitment should not come at the expense of limiting participation. This understanding of Title IX is in keeping with earlier Sixth Circuit Title IX jurisprudence. In *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association*, the Sixth Circuit declared that “[i]n Title IX, Congress struck a balance between the needs of the individual athlete and the group and determined that for purposes of the statute equality is to be measured by the opportunities offered to the group,” not the individual.¹⁴⁶

While I see absolutely no harm in allocating the number of traditional and nontraditional seasons among girls’ and boys’ teams—and would generally argue that this is an equitable solution, far better than same-season scheduling—I do not agree that Michigan’s prior schedule violated Title IX. The schedule maximized participation opportunities and worked with the limited facilities, equipment, coaching staff, officials, and other resources available to schools. Although the girls’ sports were not played in traditional NCAA seasons, I argue that this is irrelevant for the purpose of Title IX, and that the schedule complied with the ten-factor analysis set forth by the OCR.

B. Why Same-Season Scheduling Is Antithetical to Title IX

¹⁴⁵ See *supra* Section I.B.

¹⁴⁶ 647 F.2d 651, 657 (6th Cir. 1981).

Same-season sports scheduling is contrary to the goals of Title IX because it decreases participation opportunities and invites discriminatory practices. For example, earlier this year, a girls' basketball coach filed suit in Indiana federal court, alleging discrimination in violation of Title IX, because boys' basketball games are scheduled on weekend nights and half of the girls' basketball games are played during the week.¹⁴⁷ The coach alleged that this disparate treatment results in several disadvantages to the girls, both athletically and academically.¹⁴⁸ The girls are unable to draw the same crowds for their weekday games, and do not have the same opportunity to compete before audiences.¹⁴⁹ Additionally, the girls are required to play games on school nights, impinging on their ability to complete their studies and to get adequate sleep.¹⁵⁰ This is exactly the kind of inequity that results from a same-season sports schedule, when boys and girls teams have to compete for coaches, court time, and officials.¹⁵¹

While same-season scheduling works extremely well for some sports—for example, cross country and track, where the girls and boys often share coaches and practice time—same-season scheduling does not work as well in sports that require use of limited court and field time, like basketball, tennis, and soccer. While it may be logistically possible for the girls' and boys' teams to share resources when the two sexes compete at the same meets, this is an impossibility with the majority of high school sports. Although same-season sports scheduling has been

¹⁴⁷ See National School Boards Association, *Suit Says Indiana District's Girls Basketball Schedule Violates Title IX*, <http://www.nsba.org/SecondaryMenu/COSA/Search/AllCosaDocuments/Schedule-violates-Title-IX.aspx> [hereinafter *Suit Says*]; Nat Newell, *Lawsuit over Scheduling to Proceed*, INDIANAPOLIS STAR, Mar. 16, 2010, available at <http://www.indystar.com/article/20100316/SPORTS0203/3160334/1057/SPORTS02/Lawsuit-over-scheduling-to-proceed>.

¹⁴⁸ See *Suit Says*, *supra* note 147.

¹⁴⁹ *Id.*

¹⁵⁰ See *id.*

¹⁵¹ Although this does appear to be a clear violation of Title IX, my point is that this case serves as an example of the kinds of infractions that same-season sports scheduling invites.

suggested as a solution to Title IX violations,¹⁵² I would suggest that not only is this contrary to the general goals of Title IX, but it also invites discriminatory practices, like that of scheduling girls' games at disadvantageous times.

Especially in lean economic times, schools are being forced to make cuts¹⁵³ and do not have the money to construct additional facilities. If girls' and boys' teams play in the same season, they will be competing over existing facilities for practice and game time. What this means is that in order for a school to continue to support the same size varsity, junior varsity, and freshman teams in space-specific sports like basketball, soccer, and tennis, more facilities would need to be built, or some teams would have to practice in less desirable timeslots, such as before school or later in the evening.¹⁵⁴ The alternative of course, would be to cut teams or to reduce the size of remaining teams, possibly both.

Moreover, same-season sports scheduling results in a need for additional equipment. When girls and boys play in different seasons, they can share some equipment. For example, girls' and boys' tennis teams can share tennis balls, hoppers, and tennis ball launchers. Even if additional facilities are available in the community for practice time, schools will have purchase further equipment in order for girls and boys to play tennis in the same season. Given the tight budgets that schools run on, purchasing extra equipment for multiple sports may not be economically feasible.

¹⁵² In *Communities for Equity*, this was the relief that plaintiffs sought. Additionally, this was one of the three plans the district court offered for MHSAA to come into compliance with Title IX. See *supra* Part II.

¹⁵³ See, e.g., Gary Kalahar, *High School Athletic Departments Feeling Effects of Budget Crunches*, JACKSON CITIZEN PATRIOT, May 8, 2010, available at http://www.mlive.com/news/jackson/index.ssf/2010/05/high_school_athletic_department.html; *Survey: School Budget Cuts Even Worse Next Year*, E SCHOOL NEWS, Apr. 9, 2010, <http://www.eschoolnews.com/2010/04/09/survey-school-budget-cuts-even-worse-next-year>.

¹⁵⁴ It is possible that in some districts, teams could practice in other facilities, like elementary school gyms, however these facilities are often located further away and may not be as desirable. Furthermore, elementary schools are often on a later schedule than high schools, leading to a possible delay before the facility would be available. Even when this is a possibility, it is only a solution for practice time, not for competitions. Usually elementary schools are not equipped with the kinds of facilities needed for competitive play.

For these reasons, same-season sports scheduling does not remedy a Title IX disadvantageous season scheduling violation. Instead, same-season sports scheduling will only achieve the opposite of the intended result; in addition to reducing participation opportunities, it will likely lead to new inequalities: in coaching, practice times, scheduling of games, provision of facilities, and publicity. Unlike the scheduling of sports seasons, these concerns are actually addressed by the OCR's ten-factor analysis for whether equal opportunity exists in athletics, and should be given weight.¹⁵⁵ Therefore, even if a violation is found in the way that a school schedules boys' and girls' sports, the school should not be ordered to comply with Title IX by running the seasons concurrently. While this may remedy a scheduling violation, it will invite other Title IX violations and reduce participation opportunities overall. These results are antithetical to the intent of Title IX.

CONCLUSION

Contrary to the claim of plaintiffs in *Communities for Equity*, non-traditional sports scheduling does not necessarily violate Title IX. The athletic schedule at issue in the case was intended to best optimize the participation opportunities for students of all abilities. The seasons also best utilized the facilities, equipment, coaches, officials, and other resources available to the schools. While the Sixth Circuit found that this scheduling scheme violated Title IX, the court gave too much weight to factors not considered by the OCR guidelines, including NCAA seasons and the effect on college recruitment and scholarships. These factors ignore the primary purpose of high school athletics and Title IX in the high school context: participation opportunities and the countless benefits that stem from participation.

The number of girls who benefit from this change in scheduling is far outweighed by the number of students who receive less apparent benefits from participation. For many students,

¹⁵⁵ 34 C.F.R. § 106.41(c).

high school sports provide an important learning environment outside the classroom. It is on the field that many students learn teamwork, perseverance, self-confidence, and the ability to take criticism. For many students, it is their participation on a high school sports team that keeps them in school until graduation, out of gangs, and away from drugs. The court failed to give adequate weight to the interests of these students when it ruled that the MHSAA's prior schedule violated Title IX.

However, even assuming that athletic scheduling which requires females to play in non-traditional seasons violates Title IX, same-season sports scheduling is not a solution. Same-season sports scheduling has the unintended effect of limiting participation and resources. Given the countless benefits—physical, emotional, and social—of athletic participation, any solution that limits participation is contrary to the purpose of Title IX. Same-season sports scheduling has the effect of limiting participation, because schools have limited facilities, equipment, coaches, and officials. When these resources need to be allocated between girls' and boys' teams in the same season, schools will often have to choose either to reduce the size of teams or to eliminate their freshmen and junior varsity programs. These cuts will reduce the number of students who benefit from athletic participation, an effect antithetical to the goals of Title IX. Therefore, same-season sports scheduling should never be held an acceptable remedy to a Title IX violation.